11-1-1998

Should the Religion Clauses of the Constitution Be Amended

Kent Greenawalt

SHOULD THE RELIGION CLAUSES OF THE CONSTITUTION BE AMENDED?

*Kent Greenawalt**

I. INTRODUCTION

Our subject, whether the religion clauses of the federal constitution should be amended, goes to the heart of relations between government and the practice of religion in our society. These relations deeply affect the health of both religion and government. When public officials persecute some religions and embrace others, the risks are political tyranny and rigid, unthinking, unfeeling, vapid religion. No one wishes that fate for us.

When most people ask whether the religion clauses should be amended, they are really asking whether judicial interpretations have become so misguided that Congress and state legislatures should intervene and invoke the cumbersome process of constitutional amendment. It could be otherwise. Someone might believe that the fault lies with the Framers of the Bill of Rights, and that judges have faithfully interpreted provisions that are intrinsically flawed.[1] But

* University Professor, Columbia University School of Law. This written version maintains the flavor of the oral debate. It therefore contains less nuance, qualification, and citation than one would expect in a scholarly article. Some of the footnotes contain references to pieces in which I develop positions in more depth. I have received very helpful comments from Clark Lombardi.

1. A person who believes judicial interpretation should be precisely according to original understanding—whether the understanding of those who adopted a provision or of reasonable readers of the provision—might suppose that we need different relations between government and religion than were conceived at the time when crucial constitutional language was adopted. There is nothing illogical about such a position and it is apparently Robert George's position regarding the Establishment Clause. However, one rarely sees this position being taken, probably because the relevant original understanding is so debatable in its application to modern problems that people manage to find an intent that fits their views of desirable relations between government and religion.

people generally assume that the language of the religion clauses sketches a set of relations between government and religion of which they approve.[2]

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[3] According to settled judicial doctrine, the Fourteenth Amendment makes the First Amendment applicable to the states.[4] Some critics object that the Establishment Clause should not have been applied to the states. But by far the major concern about the clauses regards the Supreme Court's interpretation of those clauses. I shall concentrate on that.

I believe the present state of constitutional free exercise law is very distressing. The prevailing approach is insensitive to religious exercise, is effectively indifferent to the plight of religious minorities, and sends a deeply disturbing message about the central character of our country. My sense of Establishment Clause law is more complicated. For over two decades, the Court was guided by a threefold test of purpose, effect, and entanglement, highlighted by a principle of no substantial aid to religious institutions.[5] To oversimplify somewhat, the Court is moving away from that approach, towards a guiding norm of neutrality, under which religious and nonreligious institutions should be treated similarly. The key elements of the approach which the Court may be abandoning deserve the Court's continued support.

You might suppose from what I have just said that my views about amendment follow easily: the Free Exercise Clause should be amended and, if establishment interpretations get much worse, that clause should also be amended. However, that is not my opinion.

---

2. However, some people believe that the Establishment Clause sets up a regime of nonestablishment for the federal government that is too strict for the states. These critics usually conclude that the Establishment Clause should not have been held applicable to the states.

3. U.S. CONST. amend. I.

4. The standard account is that the Fourteenth Amendment's Due Process Clause effects this "incorporation." Some scholars, myself included, believe that greater emphasis should be placed on the Privileges and Immunities Clause and, with respect to religious classifications—and some other classifications—the Equal Protection Clause.

5. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Constitutional amendment is radical surgery. The Bill of Rights has never been amended.[6] Its symbolic strength is tied to its constancy.[7] Constitutional amendment should not be undertaken unless the Court has become mired in deep injustice, and judicial and legislative relief both appear hopeless for an intermediate future. The Supreme Court is not yet close to such injustice in its treatment of the Establishment Clause. Current controlling doctrine regarding free exercise is unjust enough to warrant amendment, but legislative and judicial means of correction have not yet been exhausted.

II. FREE EXERCISE: THE BALEFUL IMPLICATIONS OF *EMPLOYMENT DIVISION V. SMITH*

The critical question in free exercise law is simple: do religious people have *any* right of free exercise not to comply with neutral laws of general application? From 1963 to 1990 the Supreme Court's answer was a powerful "yes"; in 1990 it became a resounding "no," with two equivocal and confusing qualifications.[8]

The case most strongly illustrating a right not to comply with neutral laws was resolved in 1972. The Court had to decide whether Amish parents could withdraw their children from ordinary schools after eighth grade, despite a state law that required children to stay in school until the age of sixteen.[9] The Justices decided unanimously that the state law had to give way.[10] The Court found that vocational training within the Amish community and a rejection of secular learning were indissolubly linked to the Amish faith.[11] Because

6. However, one might count the Thirteenth and Fourteenth Amendments as overriding the Supreme Court's treatment of slaves as Fifth Amendment property in *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

7. Furthermore, as one who approves of most major Bill of Rights decisions in the last half century, many of which were initially highly unpopular, I would be loathe to see amendment become a quick fix for controversial results.

8. *See* Employment Div. v. Smith, 494 U.S. 872, 881-82, 884-85 (1990).

9. *See* Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

10. *See id.* at 234. Justice Douglas disagreed with the rest of the Court over whether the parents could be taken to represent the children's wishes; but as to the parents whose child indicated that she agreed with her parents' views, Douglas joined the result. Douglas also took a different view from the majority about other prospective claimants less religious and less law-abiding than the Amish. *See id.* at 241-49 (Douglas, J., dissenting in part).

11. *See id.* at 222-23.

fundamental religious freedoms were at stake, Wisconsin could not require ordinary schooling beyond eighth grade unless it had a compelling interest in doing so.[12] Although the State presented strong arguments that further education was necessary to prepare students for intelligent citizenship and for career opportunities, these arguments were not deemed strong enough.[13] The Court determined that state law had to yield to the Amish right to practice their religion.[14]

The Amish case stands in stark contrast with *Employment Division v. Smith*.[15] The factual and procedural nuances of the case were complicated, but the question the Court addressed in 1990 was whether an Oregon law prohibiting the use of peyote could be applied against members of the Native American Church who ingested peyote in worship services. The California Supreme Court said the following about the Native American Church a quarter century earlier:

> Peyote . . . plays a central role in the ceremony and practice of the Native American Church . . . . [T]he theology of the church combines certain Christian teachings with the belief that peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God.
>
> . . . .
>
> The "meeting," a ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion.
>
> . . . .
>
> Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious. Members of the church regard peyote also as a "teacher" because it

12. *See id.* at 221.
13. *See id.* at 234.
14. *See id.*
15. 494 U.S. 872 (1990).

> induces a feeling of brotherhood with other members; indeed, it enables the participant to experience the Deity.[16]

Nothing in *Smith* suggests that this picture is inaccurate. Yet the Court not only denied the religious claim, it rejected outright the application of the compelling interest test *or* any other balancing test.[17] If a legal prohibition[18] does not discriminate among religions and is not directed against a religion, a court has finished its job. Courts need not, they cannot, get into the kind of assessment the Supreme Court undertook in the *Yoder* case.[19] Those with religious claims must comply like everyone else. Notice, we are not talking here about religious claims to engage in morally favored alternatives, such as conscientious objection to military service; we are talking about the very center of worship services.

You will quickly recognize that what is all right for the Native American Church has to be all right for other religious groups, including the Roman Catholic Church. Imagine that a state allows counties to prohibit the sale and use of alcohol. A small county happens to be populated overwhelmingly by Protestants who use grape juice for communion and have a realistic sense of the terrible effects alcohol has wrought on human welfare. The county legislature bans the sale and use of all alcoholic beverages, making no exception for sacramental use in communion, despite the presence of four Catholic churches in the county. You might have presumed that the privilege to use wine during Mass is at the core of what the Free Exercise Clause protects. After *Smith*, you would be wrong. You might ask whether the law discriminates against Roman Catholics. A genuine wish to stem the use of alcohol as much as possible would not discriminate. One response might be that no one with the least empathy for Roman Catholicism would pass such a law. The answer provided

---

16. People v. Woody, 61 Cal. 2d 716, 720-21, 394 P.2d 813, 817-18, 40 Cal. Rptr. 69, 73-4 (1964).

17. *See Smith*, 494 U.S. at 884-86.

18. Some language in the opinion refers to criminal laws, but nothing suggests that prohibitions with noncriminal consequences should be treated differently. I assume that the rule established in *Smith* applies to both civil and criminal prohibitions.

19. *See Yoder*, 406 U.S. at 214-19 (1972) (balancing the State's interest against the traditional interest of parents with respect to the religious upbringing of their children).

by *Smith* is that the signs of discrimination must be publicly evident, not guessed at by judges. Moreover, the Court apparently believes that insensitivity does not amount to discrimination.[20]

If restrictions on the use of wine in communion seem a remote possibility, a legislative ban on gender discrimination in all employment may be less remote.[21] I do not believe there are decisive reasons to limit the priesthood to males, and I have a sister who is a dedicated and effective minister. Nevertheless, I do not believe the state should be telling religious groups what standards they should have for creating clergy. Under *Smith*, the state can do just that if its law is general.

What led the Court to its conclusion in *Smith*? The majority opinion claims support from prior Supreme Court decisions.[22] No one doubts that the opinion puts aside the most recent authoritative formulations of controlling standards. Judicial opinions are often less than candid in the way in which they line up earlier decisions. *Smith* pushes the limits of accepted judicial practice in its ingenious marshaling of preceding cases.

You might think that the Court would not reach such a harsh result—against the grain of earlier cases—unless it felt compelled to do so by the language of the Constitution itself. Some Justices in the majority may have held this view,[23] but the opinion asserts nothing of

---

20. *See generally*, Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 343-45 (1995) [hereinafter Greenawalt, *Quo Vadis*] (discussing the possibility that indifference and inattention might amount to a constitutional violation). I am more sympathetic to this approach than the Supreme Court appears to be.

21. One might think that criteria for clergy falls into a "hybrid" category—raising free association as well as religious exercise claims—which I shall discuss shortly. *See infra* pp. 16-16. However, it is difficult to understand why hiring criteria for clergy count as a matter of free association, while use of a substance such as peyote as the center of associational life does not. One might also argue against the application of a ban on gender discrimination when training and hiring clergy if, for example, a religious group views women as incapable of performing tasks essential to the salvation of parishioners, making women critically different from men for fulfilling the role of a priest.

22. *See Smith*, 494 U.S. at 879 (citing Reynolds v. United States, 98 U.S. 145 (1879)).

23. Because individual Justices often compromise over language in order to build an opinion that will win the support of a majority, the positions expressed

the sort. It does not say that the language of the Free Exercise Clause requires the result. The Justices contend only that their decision gives the text about not prohibiting free exercise a "permissible reading," that they do not think the words *must* be taken to give religious claimants privileges against ordinary legal prohibitions.[24] For a decision that reverses twenty-seven years of constitutional law, this degree of reliance on text and original understanding is incredibly weak.

One need not look far to see the underlying reasons for the reversal. If courts are to grant constitutional privileges to religious claimants, they have to be ready to decide whether the claimants are sincere, whether the claims are religious, whether the interference with religious exercise is substantial, and whether the government has a strong interest in applying a law uniformly against religious claimants as well as others. These can be daunting inquiries which the Court does not think judges should have to undertake. The Court wants clear, more reliable standards of decision than the compelling interest test, as that test has been applied to claims for privileges based on religion.[25] The Court is not opposed to exceptions for religious claimants, but the creation of these exceptions must be left to legislatures, not to courts employing amorphous standards that yield arbitrary decisions. The last sentence of the opinion in *Smith* is remarkably candid:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto

---

in an opinion are not always a sure guide to what each Justice believes.

24. *See Smith*, 494 U.S. at 878.

25. The "compelling interest test," as applied to claims for exemption from valid laws, has never been as difficult a hurdle for the government to overcome as the stringent compelling interest test courts typically apply in equal protection and free speech contexts. Because a claimant's victory in the free exercise exemption cases means carving out an exception to laws that are themselves appropriate, the courts have justifiably lowered the government's burden. *See generally* Greenawalt, *Quo Vadis*, *supra* note 20, at 330-33.

itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[26]

I have mentioned that the Court does qualify the *Smith* decision in two ways.[27] First, it leaves standing a line of cases holding that unemployment compensation may not be denied to people because they refuse to work on Saturday, if their reason for refusing to work is religious conviction.[28] The opinion does not indicate clearly just how far the principle of these cases extends.

Second, the Court discusses hybrid cases in which free exercise claims link to other constitutional claims.[29] The hybrid discussion seems jerry-built to take care of the *Yoder* case, in which parental rights were linked to religious claims.[30] I have yet to meet someone who thinks all of the hybrid discussion in *Smith* makes sense.[31] In some hybrid cases, other constitutional claims are sufficient by themselves. Most cases in which free speech and free exercise claims overlap are of this variety. In these cases any free exercise arguments are superfluous. According to the Court, free exercise arguments could matter in another class of cases—cases in which neither the free exercise claim nor the other claim is sufficient by itself, but together they carry the day. I do not quarrel with the possible existence of such cases; but if free exercise claims, in combination with other claims, can put some parties over the top, it is nonsensical to suppose that they can *never* be sufficient alone. How can free exercise claims always be too weak by themselves if they are sometimes strong enough to win in combination with other claims? To imagine that a particular kind of claim can only succeed when bolstered by another claim is conceptually incoherent.

---

26. *See Smith*, 494 U.S. at 890.

27. *See supra* text accompanying note 18.

28. The initial case in this line was *Sherbert v. Verner*, 374 U.S. 398 (1963).

29. *See Smith*, 494 U.S. at 881.

30. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1971).

31. One might suppose that all five Justices in the *Smith* majority think it makes sense, but because the language may be designed to take care of *Yoder*, and because it may be the product of compromise, it is uncertain how many of the Justices think a principled defense can be made of the position taken in *Smith*.

One further point needs to be made about the Court's qualifications to its basic approach. The very inquiries about sincerity, religion, substantiality of interference with religious practice, and strength of government interest, to which the Court objects so strenuously, are necessary to assess whether particular religious claims of exemption in the unemployment compensation and hybrid categories should receive constitutional protection.

Setting these dubious qualifications aside, we come to the disconcerting conclusion that the Supreme Court has nearly written the Free Exercise Clause out of the Constitution. The Clause continues to figure in cases involving religious belief and speech,[32] religious discrimination,[33] and disputes over church doctrine.[34] However, the Free Exercise Clause no longer has any real effect on the outcome. The Free Speech Clause, the Establishment Clause, and the Equal Protection Clause would probably produce the same results without a Free Exercise Clause.[35] Any doctrine that so eviscerates a fundamental constitutional right is certainly suspect.

The difficulties of adjudication that worry the Court so much are indeed formidable, but the Court's choice to abandon minority religions to possibly inhospitable legislatures is much more troubling. Some important constitutional cases have a striking effect on the lives of many people.[36] Other important cases matter more for what they symbolize. The *Smith* case has great symbolic significance. It symbolizes judicial rigidity, extreme majoritarianism, and lack of concern for the religious rights of minorities.

Yet I do not favor an amendment to rectify *Smith* at this stage.[37] In June 1997, the Court struck down the Religious Freedom

---

32. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-06 (1940).

33. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 520 U.S. 520, 531-32 (1993).

34. *See* Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445 (1969).

35. The presence of a Free Exercise Clause over history has affected how these other clauses, especially the Equal Protection Clause, have been understood in their application to religion. I do not deny that the Clause has been relevant in that way.

36. Among these are *Brown v. Board of Education*, 349 U.S. 294 (1955); *Roe v. Wade*, 410 U.S. 113 (1973).

37. *See generally* Kent Greenawalt, *Why Now Is Not the Time for Constitutional Amendment: The Limited Reach of* City of Boerne v. Flores, 39 WM. &

Restoration Act, adopted virtually unanimously by Congress, which was designed to reinstate the pre-*Smith* approach to free exercise.[38] The Court stated that Congress lacked power under the Fourteenth Amendment to adopt such a law against states and localities.[39] However, nothing the Court said precludes such federal legislation as it applies to federal laws and executive acts.[40] Nor does the decision preclude similar legislation within states. Furthermore, states can use the compelling interest standard to interpret free exercise provisions in their own constitutions. As long as these avenues are open to undo the practical effects of *Smith*, it is too early to urge a constitutional amendment to accord religious believers the privilege that *Smith* denies them.

III. THE DISQUIETING MARCH TOWARD NEUTRALITY IN ESTABLISHMENT LAW

The status of establishment law is harder to describe than that of free exercise, and my disquiet is more ambivalent. Since 1947, when the Supreme Court first applied the Establishment Clause to state and local government, its decisions have been what I would call moderately separationist. Separationist in emphasizing the desirability of keeping government and religion apart, and moderate in refusing to push that principle to the limits of its logic. In that first case, *Everson v. Board of Education*,[41] the Court embraced Jefferson's phrase that the Establishment Clause requires "a wall of separation between church and State."[42] However, the majority held that public payment for the bus transportation of parochial school students did not violate that requirement.[43] Subsequently, the Court has upheld property tax exemptions for churches,[44] various fringe assistance to parochial

---

MARY L. REV. 689 (1998) [hereinafter Greenawalt, *Why Now Is Not the Time*] (asserting that a more preferable alternative to constitutional amendment is effective statutory relief).

38. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

39. *See id.* at 2172.

40. Some of the language in the opinion reads as though the Religious Freedom Restoration Act is invalid in all its applications. *See id.* at 2160; *see, e.g.*, Greenawalt, *Why Now Is Not the Time*, *supra* note 37, at 692.

41. 330 U.S. 1 (1947).

42. *Id.* at 16.

43. *See id.* at 18.

44. *See* Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970).

schools,[45] more substantial aid to religious colleges,[46] and salaries for chaplains employed by state legislatures.[47] However, the Court has held that prayers and devotional bible reading as classroom exercises in public schools,[48] and prayer as part of a graduation ceremony,[49] are not acceptable. Most importantly, the Court has blocked substantial direct aid to parochial schools.

Since 1971 the Court's main doctrinal standard for establishment cases has been the threefold test of *Lemon v. Kurtzman*.[50] Under the *Lemon* test, a law or government practice is invalid if it lacks a secular purpose, has a primary effect of advancing or inhibiting religion, or unduly entangles government with religion.[51] Dissenting justices and many scholars have ridiculed the *Lemon* test and by now seven sitting Justices have either urged its outright rejection or have proposed that courts approach establishment cases without any single overarching standard.[52]

In certain types of cases the Court's majority has already adopted a different approach, one that may be viewed as a substitute for, or variation of, the purpose and effect aspects of *Lemon*. Under this approach, known as the "endorsement test,"[53] a court asks if a display of religious symbols endorses a particular religion, sending an impermissible "message to nonadherents that they are outsiders, not full members of the political community . . . ."[54]

One of the most important cases dealing with the Establishment Clause in recent years is *Rosenberger v. Rector and Visitors of the*

---

45. *See* Board of Educ. v. Allen, 392 U.S. 236, 238 (1968).
46. *See* Tilton v. Richardson, 403 U.S. 672, 689 (1971).
47. *See* Marsh v. Chambers, 463 U.S. 783, 793-94 (1983).
48. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding that daily recitation of prayer in public schools is "wholly inconsistent with the Establishment Clause"); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 205 (1963) (state law requiring school day to begin with Bible readings was deemed unconstitutional).
49. *See* Lee v. Weisman, 505 U.S. 577, 599 (1992).
50. 403 U.S. 602, 612-13 (1971).
51. *See id.*
52. *See* Greenawalt, *Quo Vadis*, *supra* note 20, at 359-61.
53. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 763 (1995); County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989).
54. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

University of Virginia,[55] which was decided in 1995. The University of Virginia had funded various student publications but had refused to finance the printing of *Wide Awake*, an evangelical Christian journal.[56] The students who were publishing the journal complained that they were being discriminated against because of their religious point of view.[57] The University argued that giving public money to a journal devoted largely to proselytizing would constitute government support of religion.[58] The Supreme Court held that singling out a journal because of its religious message constituted viewpoint discrimination.[59] Such discrimination violated the Free Speech Clause of the First Amendment unless the discrimination could be justified to avoid establishing religion.[60] The Court stated that providing money for one religious publication among many student journals would not be an establishment of religion; therefore *Wide Awake* was entitled to be funded.[61]

The Justices rightly saw the case as involving a clash between a principle of "no support" and a principle of "neutrality," under which the government acts appropriately if it does not classify on the basis of religion.[62] Members of the majority attempted to make the holding of the case as narrow as possible, stressing that money for the journal came from student fees, not general taxes, and that the funds went to the outside printer, not the religious publication itself.[63] The dissenters emphasized that Madison's *Memorial and Remonstrance Against Religious Assessments*, a crucial document in the church-state history of Virginia and the country, had opposed any use of taxes for religious purposes.[64] In response, Justice Thomas argued that Madison objected only to religion being singled out and that

55. 515 U.S. 819 (1995).
56. *See id.* at 827.
57. *See id.*
58. *See id.* at 838.
59. *See id.* at 845; *see, e.g.*, Kent Greenawalt, *Viewpoints From Olympus*, 96 COLUM. L. REV. 697, 698 (1996) (suggesting that in most of its coverage, the guideline did not constitute viewpoint discrimination).
60. *See Rosenberger*, 515 U.S. at 837.
61. *See id.* at 843-46.
62. *See id.* at 839-41.
63. *See id.* at 840-44.
64. *See id.* at 868-71 (Souter, J., dissenting).

neither Madison's views nor the Establishment Clause bar public money going to religious institutions so long as eligibility does not turn on their religious character.[65]

Shifting from this drastically curtailed and oversimplified account of present Establishment Clause law, I now sketch my views of that law: (1) nonestablishment is a vital bulwark of religious liberty and religious vitality, as well as a shield against religious conflict; (2) the standards of the *Lemon* test are much sounder than they are generally thought to be; and (3) it would be a misfortune if neutrality was to swallow up the principle of no support.

I believe in nonestablishment; not everybody does. In various forms one hears the following sentiments expressed:

> Religious liberty is wonderful and no one should be coerced into religious practice, but government aid to religion is fine, and it would be a good thing if religious institutions had more influence on government in this increasingly materialistic, selfish, and permissive age. Neither the United States nor individual states should have an official church like the Church of England, nor should they announce particular religious doctrines as those of the government, but that is about as far as nonestablishment should go.

Some critics claim that nondiscriminatory support of branches of the Christian religion is permissible because the Framers accepted this type of government support. Others acknowledge that the government should treat all religions similarly, but may assist them all.

Some critics portray those who favor strong separation of church and state as secularists who would like to undermine what they arrogantly regard as foolish superstition. However, many people who care deeply about religion also favor separation. I count myself within that category. I believe that religion is most vital when it is not intertwined with government. Social explanations are always complex and controversial, but a look at religion in Western Europe should cause any advocate of support to pause. In country after country with an official church, or at least substantial support given to various churches and religious schools, religious involvement has

65. *See id.* at 854-58 (Thomas, J., concurring).

declined to a level far below that in the United States.[66] Religion thrives as much as it does in the United States partly because it does not have the state's imprimatur.

The fact that government support of religion is unhealthy does not itself reveal what should be enforced by courts and what should be left to legislatures. An opponent of separationist judicial decisions might concede that official support of religion is undesirable, but contend that under our Constitution these matters should be decided by political representatives. This is not the occasion for me to defend judicial involvement against various arguments in favor of judicial passivity. However, if the courts do not defer to legislation that impinges on other constitutional rights, there is no persuasive basis for their doing so when the Establishment Clause is at issue.

What of the threefold test of *Lemon* as a set of constitutional standards?[67] Critics generally concede that some forms of aid to religion do violate the Establishment Clause, but dissenting justices and others have taken strong exception to the purpose and entanglement components of the *Lemon* test. With regard to purpose, if legislation is not otherwise objectionable, the fact that it is adopted with bad motives is said to be irrelevant. In my opinion, the real issue is how judges determine which purposes underlie laws. For example, a moment of silence to start the day in public schools is constitutionally permissible.[68] Suppose a state legislature mandates a moment of silence and states in the statutory preamble: "In order to encourage Christian prayer and promote participation in the Christian religion, but having been restrained by misguided judicial decisions prohibiting Christian prayers spoken by teachers, we hereby adopt this moment of silence." Such an outright statutory endorsement of Christian prayer should be declared unconstitutional. In such instances, forbidden purposes can be fatal to a law.

My view of entanglement is similar. If official positions are assigned by law to members of particular religions, or the government begins to review the merits of choices of clerics by religious

66. *See Americans are Churchgoers*, SOC'Y, July 17, 1998, at 2.

67. *See* Greenawalt, *Quo Vadis*, *supra* note 20, at 361-69.

68. One can discern this from a careful reading of all the opinions in *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

groups,[69] the state and religious institutions have become impermissibly intertwined. Whatever may be the best conceptualization, some involvements between church and government are too great. The serious argument is over which entanglements are too excessive to be constitutionally permitted.

The *Lemon* test need not be retained as an all-purpose standard for every establishment case. Perhaps developing more individualized approaches to various types of problems would be wiser. However, I strongly believe that the fundamental elements of purpose, effect, and entanglement represent sound insights about nonestablishment.[70]

This brings us to the fundamental issue of "no support" versus "neutrality," which needs a little more clarification. Few people are proposing to support religious groups with public funds solely because the groups are religious. Even if the rationale is that religion is good for civic life, the state cannot single out religion for financial support. The proponents of neutrality take one of two positions. The more sweeping position—apparently urged by Justice Thomas—is summed up as follows: So long as the government does not classify groups according to religion, it may aid religious groups in the same way it would aid any other group.[71] Suppose the government decides that private associations are vital for civic life. Based on this view, government grants are provided to all private associations with active memberships, including religious bodies, with each group permitted to spend with active memberships its money as it pleases. It turns out that about half of the associations to benefit are religious. Under such a scheme, tax money would go directly to churches, synagogues, and other religious institutions where much of it would be spent for religious purposes. Such a plan would be "neutral," but the

69. Such review would be a problem if any law required nondiscriminatory hiring of clergy. How would an agency or court decide whether a church's claim of nondiscriminatory choice was valid? Ordinary resumes do not reveal whether someone has the right "spiritual" qualifications.

70. *See, e.g.*, Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781 (1998) (drawing on these elements in analyzing *kosher* and *get* laws).

71. *See Rosenberger*, 515 U.S. at 861.

use of tax money to promote religious efforts is contrary to our constitutional tradition and should be considered unacceptable.

The more modest position insists that the religious groups that receive financial support do so because they provide a specific secular benefit, such as medical care, adoption services, or schooling. Public money would go for the provision of these benefits. Indeed, a great deal of money currently goes to religious institutions that run hospitals and welfare assistance programs, as well as providing other services. Thus far, the Supreme Court has drawn the line at parochial schools, stating that substantial assistance to them would impermissibly aid the religious efforts of the schools. Many Roman Catholics, among others, have regarded these decisions as harsh and perhaps even a denial of their right to send their children to religious schools. A full blown "neutrality" approach would wipe away these decisions, allowing aid to be given to religious schools up to the secular benefit of the schooling they provide. Among other things, this approach would validate voucher plans geared towards increasing parental choice, even when the plans include religious schools and most of the schools benefitted are in fact religious.

My late wife Sanja and I sent our three children to a religious school for all, or almost all, of their schooling. Our last son had to leave after tenth grade because the high school was closed, largely due to financial reasons. One of the two children in my new family attends a Catholic school. I am sympathetic to religious education and its financial exigencies, but I continue to believe that significant state support is unwise. Citizens should not be taxed to promote religion, even when selection of beneficiaries is neutral. Programs of support will inevitably inject religious groups in a politically divisive scramble for funds, and in the long run, reliance on the government may undermine the special quality of religious schools. Thus, I am troubled by the prospect of a march from "no support" to "neutrality."

The changes in Supreme Court doctrine that may take place in the near future would be unfortunate, but they do not presage the sort

of grave injustice that would warrant amendment of the Establishment Clause to codify the "no support" principle found in many state constitutions.[72]

IV. CONCLUSION

In summary, I am concerned about the movement in the Supreme Court's interpretation of the Establishment Clause, but I do not think the developments which concern me should lead to formal amendment. At present, my view is the same about the Free Exercise Clause. Here, I believe the principle that the Court has rejected is important enough to justify an amendment, but that principle may still be saved by legislatures and by state courts' interpretations of state constitutions.

72. Another strategic reason not to seek an amendment is that adoption of an explicitly strict separationist approach would not be very likely.